

Appeal from a decision of the Alaska State Office, Bureau of Land Management, that rejected part of Native allotment application AA-6166.

Reversed and remanded.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

The amendment provision of sec. 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988), is only available to Alaska Native allotment applicants and may not be used to appropriate land in addition to that originally claimed by a Native allotment applicant.

2. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Applications and Entries: Relinquishment

Acceptance by a Native allotment claimant of half the lands described in her application did not establish a waiver of her claim to the remainder. Since half the allotment described by her application was eliminated administratively without her knowledge or consent her entire application was pending before the Department on Dec. 18, 1971, because the elimination occurred without a hearing on a disputed question of fact underlying the action taken.

APPEARANCES: Gregory Peters, Esq., Alaska Legal Services Corporation, Dillingham, Alaska, for appellant; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Alaska Region, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Matilda S. Johnson has appealed from a February 27, 1991, decision of the Alaska State Office, Bureau of Land Management (BLM), that rejected land claimed in sec. 1, T. 16 S., R. 56 W., Seward Meridian, Alaska, by her Native allotment application AA-6166. The eastern half of her allotment

claim, comprising 80 acres in sec. 6, T. 16 S., R. 55 W., Seward Meridian, was determined to have been legislatively approved and is not now directly at issue. The February 1991 BLM decision found that the west half of her allotment claim, described as the N½ NE¼ of sec. 1, had been administratively removed from Johnson's application on June 24, 1971, and rejected that part of her claim. The decision explained:

Although the BLM recognizes the applicant never formally relinquished her claim to a full 160 acres, the applicant is barred from claiming the additional 80 acres by her failure to seek a correction of the 80-acre description in a timely fashion. Section 905(c) of ANILCA states that if the description is to be amended, it has to be amended by the date set. Adequate notice of the date set was given, and the applicant did not attempt to correct the allotment description to identify the 160 acres originally sought. The applicant also signed a written document stating that the survey description of 80 acres was correct. See Daniel Roehl, 103 IBLA 96, 100-101 (1988); Angeline Galbraith, 97 IBLA 132, 144-145 (1987). Therefore, Native allotment application AA-6166 is hereby rejected as to the additional 80 acres requested.

(Decision at 2). Appeal was timely taken from this rejection.

In her statement of reasons (SOR) filed on appeal, Johnson contends, concerning the elimination of the western half of her allotment claim, that:

On June 24, 1971 the BIA [Bureau of Indian Affairs] filed an amended legal description encompassing the 80 acres located within Sec. 6 * * * but eliminating the 80 acres within Sec. 1. No notice of this amendment was provided to Mrs. Johnson by the BLM, nor did she execute a relinquishment of the deleted acreage, nor was she advised that she could still claim an additional 80 acres as her full entitlement.

(SOR at 2). The SOR suggests that this change was prompted by an apparent "conflict with the Clarks Point townsite application AA-504," which, it subsequently developed, "did not conflict with Mrs. Johnson's application." Id. Nonetheless, the BLM case file indicates that the west half of the Johnson claim was transferred to Choggiung Limited by Interim Conveyance No. 239 on September 17, 1979. Johnson's position on appeal is described in a document entitled "survey acceptance" dated June 12, 1990, that bears her signature. The body of this document reads as follows:

Name:	Matilda S. Johnson, AA-6166
U.S.S.:	Lot 5, USS 7800
Acres:	80.00
Location:	Sec. 6, T. 16 S., R. 55 W., S.M.

I have carefully reviewed the survey of my Native allotment. Though this survey includes only the eastern 1/2 of the land I had applied for in 1970, I will accept this survey as being correct for part of my allotment.

I hereby request the BLM to issue me certificate to these 80 acres as they are shown and to begin processing the other 80 acres that I originally applied for.

Attached is a copy of my original application (with a copy of the original sketched map) that the Bureau of Indian Affairs has had on file since the beginning of 1971. Also attached is a complete legal description for the additional 80 acres and a copy of the survey plat for USS 7800, showing how the 80 acres should abut my current 80 acres.

I ACCEPT THIS SURVEY as being correct for the east 1/2 of my original Native allotment. [Capitals in original.]

BLM does not dispute the summary of events appearing in Johnson's SOR insofar as it describes the manner in which her allotment application was handled. Johnson summarizes actions taken concerning her allotment by BLM as follows:

On November 29, 1982, Mrs. Johnson was notified by the BLM that her application for the 80 acres in Sec. 6 * * * had been legislatively approved * * *. The notice further stated that if the lands described in the approval section were not those the applicant intended to claim at the time of the application, she had 60 days to notify the BLM. Mrs. Johnson did not respond to this notice. The 80 acre parcel was subsequently surveyed as Lot 5, USS 7800, and the plat of survey was filed on December 13, 1989. No notice of the filing of the plat of survey was ever given to Mrs. Johnson.

On June 19, 1984, the BLM issued patent to the townsite trustee for Clarks Point. * * * The patent refers to USS 4992, which status plats indicate is over 1/2 mile to the north of the acreage Mrs. Johnson applied for in Sec. 1, T. 16 S., R. 56 W. The land Mrs. Johnson applied for was actually conveyed to the ANCSA village corporation for Ekuk in 1979 * * *.

On May 10, 1990, approval of Mrs. Johnson's allotment was confirmed and conformed to survey, i.e. Lot 5, USS 7800, containing 80 acres. The BLM notice stated that if the surveyed location was different from the intended location, Mrs. Johnson had 30 days to submit evidence of the error. [Citations and footnote omitted; emphasis in original.]

(SOR at 3, 4).

While admitting that Johnson did not consent to reduction of her claim by half (and that the action was taken without notice to her), BLM argues that she nonetheless waived her claim to the western half of her

land in 1982 when she failed to respond to a BLM notice sent in November 1982 stating that her allotment claim "encompasses approximately 80 acres" (BLM Answer at 3). Further, BLM argues that Johnson signed a "survey acceptance" on May 22, 1990, confirming that the 80 acre tract surveyed "is what I originally applied for." *Id.* at 5. Finally, BLM argues that Johnson may not now amend her allotment application to claim 160 acres, because such amendment is barred by Alaska National Interest Lands Conservation Act (ANILCA) section 905(c), 43 U.S.C. § 1634(c) (1988).

Disputing the conclusions drawn by BLM, Johnson advances the argument that:

Mrs. Johnson did not fully understand the implications of the [BLM] notice [of survey acceptance dated May 21, 1990]. She was advised by Gusty Chythlook, a realty specialist with the BBNA, to sign the acceptance so she could get a certificate to the 80 acres. He was unaware that Mrs. Johnson originally applied for 160 acres. * * * Shortly after signing this survey acceptance, Mrs. Johnson was contacted by Paul Roehl, another realty specialist with BBNA, who discovered the discrepancy between her original application for 160 acres and the survey for 80 acres and sought to rectify it. Consequently, a second survey acceptance, dated June 12, 1990, was signed by Mrs. Johnson, accepting the 80 surveyed acres but specifically requesting that the BLM reinstate the additional 80 acres eliminated by BIA's amendment in 1971. [Citations omitted.]

(SOR at 4).

[1] In opposition to this reading of events, it is BLM's position that when Johnson received the November notice from BLM in 1982, if she wished to maintain her application as originally submitted, she was required to "request an amendment to conform to what she originally intended to claim and describe within the time set out in the final notice to amend" (Answer at 9). This conclusion is reached in reliance on the assumption that ANILCA section 905(c), 43 U.S.C. § 1634(c) (1988), (governing amendments by an allotment applicant) operates in this case to bar Johnson's claim to the west half of her allotment because of her failure to timely "amend" her allotment in order to show that it had not been changed. The statement of this proposition, however, shows that BLM has applied ANILCA section 905(c) in error in this case.

The contention by BLM that section 905(c) of ANILCA should apply to Johnson's allotment claim and that her failure to respond to the notice of November 29, 1982, controls the disposition of her appeal must be rejected. Section 905(c) provides that a Native applicant "may amend the land description contained in his or her application if said description

designates land other than that which the applicant intended to claim at the time of application and if the description as amended describes the land originally intended to be claimed." According to the legislative history of section 905(c), errors that are "subject to correction" include "[t]echnical errors in land description, made either by the applicant or by the Department in computing a metes-and-bounds or survey description from diagrams." S. Rep. No. 413, 96th Cong., 2d Sess. 286, reprinted in 1980 U.S. Cong. & Ad. News 5070, 5230.

Section 905(c) was only intended to allow, subsequent to December 18, 1971, amendment of a Native allotment application to accurately describe land originally intended to be claimed but that was misdescribed in error, and was not intended to permit substitution or addition of new land not included in the original claim. See, e.g., Mitchell Allen, 117 IBLA 330, 337 (1991), and cases cited therein. The amendment provision of section 905(c) is only available to an applicant who is seeking land different from land described in the original application and an amendment is not appropriate to claim land in addition to that originally claimed. Alyeska Pipeline Service Co., 127 IBLA 156, 160-61 (1993).

In the instant case, BLM received Johnson's Native allotment application on February 23, 1991, describing 160 acres as the "N1/2NW1/4 Section 6, Township 16 South, Range 56 West and N1/2NE1/4 Section 1, Township 16 South, Range 56 West, Seward Meridian, Alaska." In a letter dated June 18, 1971, BIA informed Johnson that it had determined that her allotment was in conflict with a townsite and that "[w]e have changed the description of land in your application to cover the part outside the Townsite." BIA submitted the amended application for 80 acres in sec. 6 to BLM on June 24, 1971. Although the record indicates that in later communications with Johnson BLM referred to the 80 acres described by BIA, the official record showed Johnson's 80 acre allotment application to be "AA-6166 A, until the "A" designation was removed by BLM in May 1990. The "A" designation indicated that the Native allotment applicant claimed more than one parcel of land.

In the November 29, 1982 letter to Johnson, BLM stated that its records showed her allotment consisted of approximately 80 acres in sec. 6, T. 16 S., R. 55 W., Seward Meridian. After quoting from section 905(c), BLM stated that Johnson should amend her description within 60 days or be barred from claiming more than the 80 acre tract in sec. 6. When BLM asserts in its answer at page 8 that Johnson "lost her right to amend her Native Allotment Application," it assumes that an amendment would have been possible in her case under section 905(c) and was required if she wished to claim a right to the N $\frac{1}{2}$ NW $\frac{1}{4}$ of sec. 1. But such an amendment under section 905(c) was not available to Johnson, inasmuch as section 905(c) limits amendment to technical errors in description, where an original application failed to correctly describe the land claimed. Since, in this case, the description originally provided by Johnson correctly described the land she sought, there was no room to apply section 905(c). Under the circumstances of this case, she never had a right to "amend" her description in the manner suggested by BLM.

Since both BLM and Johnson agree that she did not amend her allotment, it is clear that section 905(c) cannot now be applied in the fashion suggested by BLM so as to invalidate her original claim. Johnson contends that she is claiming, under the application she filed in 1971, allotment of 160 acres of contiguous land in secs. 1 and 6. She has never contended that the description of her original application was not correct, nor does she now contend that any change in the land description is needed. The provision of ANILCA that allows an applicant to conform her allotment description to reflect accurately her claim is not relevant to the facts of this case. See 43 U.S.C. § 1634(c) (1988).

[2] The question to be decided now (as Johnson contends) is whether she "knowingly and voluntarily relinquished" her rights to the west half of her allotment within the meaning of ANILCA section 905(a)(6). BLM contends that such an event occurred in 1982 when she remained silent after she received a notice from BLM indicating that only the eastern half of her application was being considered for approval. Then in May 1990, according to BLM, she confirmed her waiver of her rights to the western half of her claim in writing when she signed the initial survey acknowledgement without explanation or objection. The effect BLM attributes to this document is that of a written relinquishment of Johnson's claim to the western 80-acre tract. As Johnson points out, the Department has often confronted this issue in cases where a Native allotment application has been rejected because it was purportedly relinquished in writing.

"Waiver is the intentional relinquishment of a known right with knowledge of its existence and the intent to relinquish it." United States v. King Features Entertainment, Inc., 843 F.2d 394, 399 (9th Cir. 1988). In Matilda Titus, 92 IBLA 343 (1986), we found that a relinquishment of a portion of a Native allotment claim was arguably not "made voluntarily and with knowledge of the applicant's allotment rights" where there were irregularities apparent on the face of a handwritten letter of relinquishment that served to "create sufficient suspicion that the document could be inaccurate or not representative of [the applicant's] intent." Id. at 343, 346. Accord, see Feodoria (Kallander) Pennington, 97 IBLA 350, 355 (1987). In both Titus and Pennington there was a document that directly waived claim to part of an allotment in specific terms. In the instant case, however, the only document that might be construed as a waiver is the May 1990 survey acceptance. This form document states, pertinently:

Survey Acceptance

Name: Matilda S. Johnson
Allotment: AA-6166
Lot #: (5)
US Survey #: 7800
Acreage: 80

I have carefully reviewed the survey of my Native Allotment parcel(s). This survey correctly represents my Native Allotment parcel(s). The location is correct, the configuration (shape) of the parcel(s) is/are correct, and the acreage is what I originally applied for.

I accept this survey as being correct.

Matilda S. Johnson
Signature

5/21/90
Date

This statement falls short of expressing a "voluntary and knowing" relinquishment of the western 80-acre tract. What it does convey is a willingness to accept BLM's survey of the eastern portion of the allotment applied for by Johnson. BLM contends, however, that this document, taken together with her prior silence when notice of the proposed survey was given in 1982, establishes a waiver of her right to the west half of her allotment.

The 1982 BLM notice informed Johnson that the eastern half of her allotment had been legislatively approved. While the notice stated that "your allotment claim is located in Sec. 6, T. 16 S., R. 55 W., Seward meridian, and encompasses approximately 80 acres," this information was not inaccurate, but merely incomplete. Inasmuch as the land approved for survey was clearly part of her original application, she had no quarrel with this finding. The 1982 notice did not inform her that the western part of her claim had been eliminated in 1971, nor was she informed that she needed to "amend" her application in order to restore it to its original condition. This circumstance does not, as BLM contends, lead to a conclusion that the November 1982 notice was sufficient to inform Johnson that her allotment had been amended in 1971 to her detriment unless she acted to prevent the threatened loss. Here, where it is admitted that Johnson had no knowledge of the "amendment" of her application by BIA, no inference whatever can be drawn from the notice except what is apparent on its face: that notice of survey of part of the allotment was given to her. The explanation for this circumstance (that unbeknownst to her, the application had been changed) was not provided. An exact explanation of circumstances surrounding the change has yet to be provided, but at some time in 1990 Johnson apparently became aware of the changed state of her application.

Johnson's June 1990 survey acceptance provides the explanation BLM contends should have been given in 1982. Therein she explains that she is willing to accept the eastern portion of her claim, but states she also has not wavered in her intention to claim the western portion as well. Now, therefore, unlike the situation in the Titus and Pennington cases, an ambiguous circumstance has been clarified by her explanation of a previously unstated position. The acceptance by Johnson of the partial grant to her of 80 acres cannot reasonably be construed to amount to a relinquishment of the remainder of her Native allotment claim in light of the fact that

Johnson was not notified directly of the change in her application made by BIA. This conclusion is inescapable, considering that the Department must view attempts to find a waiver by Native applicants of allotment rights with great skepticism. See Titus and Pennington, supra.

Because of our finding that Johnson did not waive her claim to the western tract, we conclude that no question of fact is raised by the record before us and, consequently, there is no reason to order a factfinding hearing as was done in the Titus and Pennington cases. The record does not support a finding that Johnson relinquished her claim to the western half of her claim when she accepted the eastern part, and the contrary finding by BLM must therefore be reversed. We therefore find that her Native allotment claim was pending before the Department on December 18, 1971; for although her claim to the western 80-acre tract was never withdrawn or otherwise amended it was removed from her application without a hearing on a question of fact underlying the elimination action. Nonetheless, it was not then approved pursuant to ANILCA section 905(a) (as an exception to the doctrine of administrative finality, see Ellen Frank, 124 IBLA 349, 351 (1992) and cases cited), because the land was previously conveyed by interim conveyance on September 17, 1979, prior to enactment of ANILCA in the following year. Heirs of Doreen Itta, 97 IBLA 261, 265 (1987).

The decision record before us does not indicate whether (as Johnson's SOR suggests) there may be some grounds for action to annul the conflicting interim conveyance to Choggiung Limited. According to the application filed by Johnson, her use and occupancy of the land at issue in traditional Native ways began in 1961 and continued thereafter until her application was filed, but there is no other evidence before us concerning her use of the land nor of the basis for the Choggiung conveyance. What further action may be appropriate as a result of our conclusion that Johnson's allotment was not properly limited to the eastern half of her original claim is therefore problematic. As a result, the case file must be remanded to BLM to permit evaluation of whether, under the circumstances of this case, action to cancel the interim conveyance is warranted. See Bay View, Inc., 126 IBLA 281, 288 (1993).

We therefore find that the record on appeal supports a conclusion that Johnson did not waive her claim to the western half of her allotment claim, but that her entire application for 160 acres remained pending before the Department on December 18, 1971, and was therefore subject to approval pursuant to ANILCA section 905(a). Nonetheless, because the land at issue was conveyed before ANILCA became law, Johnson's claim was not legislatively approved and BLM must now determine whether her continuing claim to the land in sec. 1 warrants further Departmental action.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the finding that Johnson's allotment was limited to a single 80-acre tract is reversed and

the case file is remanded to permit further evaluation of her claim to the 80-acre tract in sec. 1, in view of the prior conveyance of that land.

Franklin D. Arness
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge